United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

ORIGINAL

B/15

74-2291

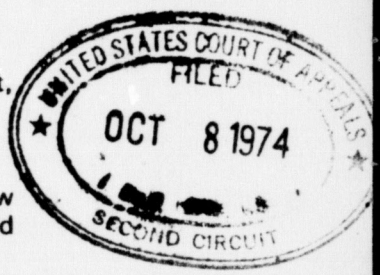
United States Court of Appeals

For the Second Circuit.

UNITED STATES ex rel. DAVID BLOOMFIELD,
Petitioner-Appellant,

v.

LOYIS GENGLER, Warden, Federal House of Detention, New York, New York, and THOMAS E. FERRANDIA, United States Marshal for the Southern District of New York,
Respondents-Appellees.



JOHN BENNETT ETTINGER,
Petitioner-Appellant,

v.

THOMAS E. FERRANDIA, United States Marshall,
Respondent-Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

JOINT APPENDIX FOR APPELLANTS

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3

PAGINATION AS IN ORIGINAL COPY

APPENDIX

TABLE OF CONTENTS

9-27-74

JUDGE CONNER

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

74 CIV. 3752

Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
UNITED STATES EX REL, DAVID BLOOMFIELD VS. LOYIS GENGLER, WARDEN, FEDERAL HOUSE OF DETENTION, NEW YORK, NEW YORK, AND THOMAS E. FERRANDINA, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK.	For plaintiff: SIEGEL & GRAHER 401 Broadway, N.Y.C. 10013 WO 2-1295 For defendant:

STATISTICAL RECORD	COSTS	DATE	NR.	PROCEEDINGS
X				Filed petition for writ of habeas corpus.

HABEAS CORPUS.

A

STATES EX REL, D. BLOOMFIELD VS. LOUIS GINGIER, ETC.

74 CIV. 3975

DATE	PROCEEDINGS	Date Judge
30-74	Filed petition for Writ of Habeas Corpus.	
7. 30-74	Filed petitioner's petition and show cause order for a writ of habeas corpus. Ret. on 9-6-74 at 11:00 a.m. CONNER, J.	
9. 5-74	Filed Petitioner's affdvt. of Herman I Graber and notice of motion for an order to continue bail during pendency of habeas corpus proceedings.	
25-74	Filed memo endorsed on petition for writ of habeas corpus filed 8-30-74. Motion denied for the reasons stated in the opinion of Magistrate Goettel dated 8-21-74 which is adopted by the Court. So ordered- CONNER, J.	
27-74	Filed petitioner's notice of appeal fro order dated 9-27-74 denying petitioner's writ of habeas corpus. Copy to U.S. Attorney. Entered 9-30-74.	

A TRUE COPY
RAYMOND F. BURCHARDT, Clerk

By _____
Deputy Clerk

B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel
DAVID BLOOMFIELD,

Petitioner,

-against-

LOUIS GENGLER, Warden, Federal House of Detention, New York, New York, and THOMAS E. FERRANDINA, United States Marshal for the Southern District of New York,

Respondent.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 74 Civ. 3752

Judge Conner

INDEX TO THE RECORD ON APPEAL

STATES DISTRICT COURT
DISTRICT OF NEW YORK

UNITED STATES ex rel
DAVID BLOOMFIELD,
Petitioner
-against-
LOUIS GENGLER, Warden, Federal
HOUSE of DETENTION N.Y., N.Y.,
and Thomas E. FEKRANDINA, United
States Marshal for the Southern District
of New York

CASE NO. 74 Civ. 3752
JUDGE Connel
CLERK'S CERTIFICATE.

I, RAYMOND F. BURGHARDT, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the certified copy of docket entries lettered A- B, and the original filed papers numbered 1 thru 5, inclusive, constitute the record on appeal in the above entitled proceeding; except for the following missing documents:

DATE FILED	PROCEEDINGS
NONE	

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 2nd day of October, in the year of our Lord, One thousand nine hundred and seventy four, and of the Independence of the United States the 199th year.

Raymond F. Burghardt
Clerk of the Court.

UNITED STATES COURT OF APPEALS
FILED
OCT 2 - 1974
2ND CIRCUIT

9-71-M

JUDGE CONNER

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

74 CIV. 3809

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
JOHN BENNETT EITINGER VS. THOMAS E. FERRANDINA, UNITED STATES MARSHAL	For plaintiff: WILLIAM ESBITT 122 East 42nd St. N.Y.C. 10017 For defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
5 mailed X	Clerk		9/4/74	C. Exh. A	15 —	
			9/5/74	US		15 —
6 mailed	Marshal					
Cause of Action:	Docket fee					
	Witness fees					
Amount:	Depositions		OCT 4 1974			

A

...TT ETTINGER VS. THOMAS E. FERRANDINA, U.S. MARSHAL.

PROCEEDINGS

Filed petition for Writ of Habeas Corpus.
Filed petitioner's petition and order to show cause why an ord[illegible]
ORDER directing that a writ of habeas corpus issue against the [illegible]
9-6-74 at 11:00 a.m. CONNER, J.
Filed petitioner's memorandum in support of a writ of habeas corpus.
Filed memo endorsed on on petition for writ of habeas corpus filed [illegible]
petition denied for the reasons stated in the opinion of Magistrate [illegible]
8-21-74, as supplemented at the oral hearing before the Court on [illegible]
So ordered- CONNER, J. (m/n)
Filed petitioner's notice of appeal from order dated 9-23-74 denying
writ of habeas corpus. Copy to: U.S. Atty. Entered- 9-30-74.

[illegible], Clerk
By [illegible]
Deputy Clerk

B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Bennett Ellinger, petitioner, — against — Thomas T. Handwork, U.S. Marshal, respondent.	CASE NO. 74 Civ 58 JUDGE Cum

INDEX TO THE RECORD ON APPEAL

DOCUMENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

John Pennell & Henry T. Thomas

against

Thomas E. Shanahan, U.S. Marshall

DOCKET NO. 71

JUDGE [illegible]

CLERK'S CERTIFICATE

I, RAYMOND F. BURGHARDT, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the certified copy of docket entries lettered A- B, and the original filed papers numbered 1 thru 5, inclusive, constitute the record on appeal in the above entitled proceeding; except for the following missing documents:

DATE FILED | PROCEEDINGS

None

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 4th day of October, in the year of our Lord, One thousand nine hundred and seventy four, and of the Independence of the United States the 199th year.

Raymond F. Burghardt
Clerk of the Court.

OCT 4 [illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
- against -	74 Cr. Misc. 1, Page 10
DAVID ALLAN BLOOMFIELD and JOHN BENNETT ETTINGER,	MAG. DKT. # 74-464
Defendants.	OPINION

GOETTEL, U.S. MAGISTRATE

Canada* seeks the extradition of these defendants under rather unusual circumstances. These defendants and a third person, one Wilfred Julian Cormier, were arrested and charged in three counts: with a conspiracy to export hashish from Canada, a conspiracy to import hashish into Canada and a conspiracy to traffic in hashish. All of the offenses charged were under Canada's Criminal Code §423(1)(d). (Canada has a Narcotics Control Act, but the defendants were not prosecuted under it.)

The Offenses Charged

The evidence establishes that there was only a single conspiracy, although it may have had a multiple

* Although the United States is denominated the complainant here, we are told that they are proceeding at the request of, and on behalf of, the Dominion of Canada. Defendants have not challenged the authority of the United States to so proceed.

purpose.* Cormier (who was convicted of a substantive offense at a separate trial and apparently is still in prison in Canada) cleared through customs crates containing tapestries, in which hashish had been concealed. Apparently the authorities detected the hashish hidden in the tapestries before it cleared customs, and all three defendants were under surveillance during the attempt to make off with the hashish.

Customs clearance delays prevented the removal of the hashish for a day or two and, during this time, the three defendants, under surveillance, were seen meeting and talking on several occasions. Finally, when Cormier removed the tapestries and hashish from the customs office in a rented car, the two defendants in this extradition proceeding (they are denominated defendants here rather than respondents as is customary in extradition proceedings) were parked on a nearby hill overlooking the freight station. They followed the car containing the hashish for some distance, apparently to observe whether it was being followed by law enforcement officers. They took a route out of Saint John, New Brunswick, northward to Fredericton. It seems that Cormier became

* The facts concerning the offense are derived primarily from the opinion of the Supreme Court of New Brunswick, Appeal Division, of June 30, 1973.

suspicious on his way to Fredericton, since he turned his car around and traveled back to Saint John at speeds approaching 80 miles per hour. Presumably, it was his intention to hide the vehicle in the more crowded Saint John area. He was apprehended before he could do so.

These defendants were stopped at a road block 50 miles north of Saint John and were arrested. In the car, a road map was found with a pen and ink line showing a route from Saint John northward to Fredericton and then around through Forest City on the Canadian-United States border and then south to Bangor, Maine. All three of the defendants in the Canadian prosecution were Americans who reside in New York and Connecticut. The evidence apparently showed that if a border crossing were made at Forest City at night, there would be no customs officers on duty but that, if the most direct route to Bangor from Saint John had been taken, crossing the border at Calais, the vehicle would have been subject to a customs search. Following the arrests, it appears that both Cormier and Ettinger made confessions, and these confessions were admitted at their trial. (The

New Brunswick Appellate Court subsequently ruled that the confessions were not voluntary and should not have been admitted in evidence.)

As noted earlier, the three defendants were charged with three separate conspiracies: one concerning the import of the hashish, one concerning the exporting (apparently based on the map showing the route to the United States), and a third charging trafficking in hashish. The trial judge found that there was a conspiracy to import, traffic in, and export hashish by all three defendants. He also found that there was only a single conspiracy. Since he believed that it was not open to him to select under which of the three charges the defendants could properly be convicted, he viewed the indictment as bad and dismissed all of the conspiracy charges against all three accused. (The conviction of Cormier on the substantive count was not involved.)

Following this acquittal, the Canadian authorities had no alternative except to release these two defendants who had not been convicted of a substantive offense. They were advised that the Government of Canada had the right, and intended to, appeal their acquittal. The defendants then

returned by plane from Canada to the United States.

The Appeal

After they left Canada, the Crown prosecuted its appeal. On appeal, in the Appellate Division of the Supreme Court of New Brunswick, the appeal was "allowed" (i.e. the decision below reversed). The court found numerous errors in the proceedings below. Most important, it determined that while there was in fact only a single conspiracy, and that the defendants should not have been charged under three separate conspiracy indictments, nevertheless, the inclusion of three counts for the same offense did not render the whole indictment bad and that the trial judge erred in failing to convict on a single count of the indictment. The court, as noted earlier, found that the admission of the confessions was improper, but held that there was no miscarriage of justice since there was ample evidence of guilt without the confessions. The court also found that the trial judge had erred in not admitting certain documents in evidence, and apparently considered the excluded evidence in finding that there was sufficient evidence to support the

conviction without the confessions. Most unusual of all (in contrast to American procedures), the appellate court not only set aside the acquittal but chose which of the three offenses to proceed under - the conspiracy to import - and then sentenced the absent defendants to seven years imprisonment each.

It is argued that the in absentia sentencing was not prejudicial since the charge carried a minimum of seven years in any event. However, the appellate court commented in the course of its opinion that although there was a minimum sentence of 7 years for importing, there was no minimum for trafficking, one of the three conspiracies charged. Consequently, had the court chosen to convict on the lesser of the three charges, it follows that it would not have been compelled to administer the minimum seven year sentence.

Opposition to Extradition

In opposition to the extradition request, the defendants set forth a number of objections.

Initially, they contend that the offense for which they were convicted is not an extraditable one under the

extradition treaty. The extradition treaty* provides that "traffic in narcotics" is an extraditable offense. However, the defendants were convicted on appeal of a conspiracy to import hashish. Consequently, the defendants argue that the crime of conspiracy itself is not an extraditable offense, that importing of narcotics (as contrasted with trafficking) is not an extraditable offense, and finally, that in any event, hashish is not a narcotic drug. (This latter argument derives from the fact that, when the extradition treaty was drawn, hashish was treated under the laws of the United States and of Canada as being a narcotic drug. Under our newer narcotic control acts, as well as under our state narcotic control laws, hashish is viewed as a "controlled drug", but not, technically, as an addictive narcotic.)

The defendants also challenge the procedural circumstances under which their extradition is sought. They point out that usually an extradited person is a fugitive, and that they are not fugitives in that they were allowed to leave Canada following their acquittal by the trial court.

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* Webster Ashburton Treaty of 1842 as amended and supplemented, particularly 1889 and 1925. See discussion, infra.

They argue, further, that they are being extradited following a conviction that occurred in their absence in the appellate courts, and that they are not being sought for trial as is the common situation, but rather to serve a sentence following a conviction. They argue that the entire procedure of convicting them and sentencing them in absentia, as was done by the appeals court, is such a denial of due process under American law that their extradition should not be allowed. Finally, it is also argued that, since they had already been convicted, they can not be arrested for trial on the charges, since this would amount to double jeopardy under American law.

Conspiracy As An Extraditable Offense

The defendants argue that they are not subject to extradition under the Webster-Ashburton Treaty because the crime of conspiracy itself is not an extraditable offense under the terms of that treaty.

In Factor v. Laubenheimer, 290 U.S. 276, 287 (1933), the Supreme Court held: "The legal right to demand the extradition of fugitives from justice, and the correlative

duty to surrender are not products of international law but exist only when created by treaty." The 1925 amendment to the Webster-Ashburton Treaty (Extradition Convention-Great Britain, 44 Stat. 2100) provides, in part, that "crimes and offenses against the laws for the suppression of the traffic in narcotics" are extraditable.

The Canadian Criminal Code, §423(d), treats a person convicted of conspiracy to commit an indictable offense as being liable for the same punishment as for the underlying substantive offense, indicating that they do not view the conspiracy as a separate offense. The Government cites four Canadian cases which have explicitly held that conspiracy to violate the narcotics laws of the United States warrants extradition from Canada under the 1925 Convention. Re Brisbois, 133 C.C.C. 188 (Ont. High Ct. 1962); Re Devlin, 3 C.C.C.2d 228 (Ont. Cty. Ct. 1962); Re Whipple, 6 C.C.C.2d 577 (1972); Re Catroni and Orsini, (unreported) (Dec. 11, 1973, Montreal, Quebec).

Defendants correctly argue, however, and the Government concedes that under United States law, conspiracy

to commit a crime is distinct from the underlying substantive crime, itself; they remain separate crimes and are separately punishable. As stated by the Supreme Court in Callanan v. United States, 364 U.S. 587, 593 (1961): "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." Pereira v. United States, 347 U.S. 1, 11 (1954); Pinkerton v. United States, 328 U.S. 640, 643 (1946); Clune v. United States, 159 U.S. 590 (1895); Carter v. McClaughry, 183 U.S. 365, 394 (1902); United States v. Peterson, 488 F. 2d 645, 651, reh. denied (5th Cir. 1974). But this dichotomy between the laws of the two countries is not proper grounds to refuse extradition.

It is well-settled that extradition treaties are to be liberally construed. Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5 (1936). To be extraditable, this Court must find that the crime of which the defendants were convicted in Canada ("conspiracy to import hashish") is covered by the applicable treaty provision ("traffic in narcotics"). Obviously, the conspiracy's goal would result in trafficking in narcotics, assuming "importing" is not a different crime

from "trafficking" and that hashish is a "narcotic" (two points covered below). Since the language of the treaty is to be construed to effect its purposes - that is, to subject to extradition violators of laws intended to suppress narcotics traffic, clearly, the defendants are covered by this construction.

Importation As An Extraditable Offense

The defendants also point out that Canadian law draws a distinction between a conspiracy to traffic, a conspiracy to export, and a conspiracy to import. They argue that because they were not convicted of trafficking in narcotics, but rather, of a conspiracy to import hashish into Canada, this is not an extraditable offense under the strict language of the 1925 Convention.

However, it is clear that the Canadian statute prohibiting importation of hashish is a crime included in the treaty language of "laws for the suppression of the traffic in narcotics." As stated by the Court in In re Edmondson, 352 F. Supp. 22, 25 (D. Minn. 1972):

> "A cursory inspection of the Canadian statute reveals that the only apparent distinction between the offenses of importation and that of trafficking is the nature of the purpose of possession for

> transportation - whether for distribution or for crossing international boundaries. The maximum penalty is the same for each crime... It is equally clear that the convention language 'laws for the suppression of the traffic' is broad enough to encompass 'importation'. Any attempt to suppress the distribution and sale of drugs (trafficking) must surely in one form or another focus in part upon preventing the prohibited goods from reaching the country."

Hashish As A Narcotic

The defendants further argue that because the recent United States narcotic control acts and certain state narcotic control laws classify hashish as a controlled drug but not, technically, as an addictive narcotic, the defendants cannot be extradited under the terms of the treaty which concern "traffic in narcotics".

Hashish is defined as a "narcotic" under Canadian law (Narcotic Control Act, Regulations R.S.C. N-1, Schedule 3(1). In the United States, marijuana is a Schedule I drug "controlled substance" under 21 U.S.C. §812(c), even though it is not classed as a narcotic. Hashish, as a derivative of marijuana, stands on the same footing. 21 U.S.C. §802(15).

This issue was specifically dealt with in In re Edmondson, supra at pages 25, 26 where the Court stated:

> "(Defendants') most urgent argument is premised on the theory that the term "narcotics" does not

include marijuana and that therefore the offense of importation of marijuana is not an extraditable offense.

* * * *

Their contention is that their conviction for importing into Canada Cannabis sativa is not engaging in narcotics for the reason that marijuana (Cannabis sativa) is not a narcotic ... There is no question but that marijuana is clearly included and defined in the Canadian statute as a narcotic ... Respondents correctly note that the definitional section of the United States Code distinguishes between 'narcotic drug' and 'marijuana'. 21 U.S.C. §802 (15),(16). However, both substances are included in Schedule I - those drugs which are deemed to require most stringent control. 21 U.S.C. §812. Offenses and penalties for violation of statutes are imposed for violation of both under Subchapter I - Control and Enforcement, 21 U.S C. §841 et seq. Differences in penalties do arise under Subchapter II - Import and Export - where penalties involving narcotic offenses are more severe than those involving non-narcotics. 21 U.S.C. §960. Nonetheless, importation of any Schedule I substance (including marijuana) is subject to criminal penalty. 21 U.S.C. §952.

* * * *

Regardless of distinctions in degree, the same conduct in both countries is subject to criminal penalty. Much has been learned since 1925 concerning marijuana but it is not an unwarranted conclusion to hold it to be encompassed in the broad sense in the language of the 1925 convention."

As noted previously, importation of marijuana products (such as hashish) is criminal both in Canada and the

United States (Narcotic Control Act, R.S.C., C.N-1, §5, and 21 U.S.C.§802 (15), §812(c)(10), and §952, although marijuana products are now, technically, narcotics in Canada but not in the United States. The seriousness of the offense in the demanding and the asylum nations need not parallel. It is enough to justify extradition to Canada that the particular acts charged were criminal in both jurisdictions. United States v. Stockinger, 269 F.2d 681 (2d Cir. 1959); Collins v. Loisel, 259 U.S. 309, 312 (1922). This argument would have greater force if the status of marijuana in the two nations were reversed. Nevertheless, Canada has directed extradition to the United States under this treaty provision, of persons wanted here for marijuana violations. Re Brisbois, supra, 133 C.C.C. 188 (Ont. High Ct. 1962).

Fugitive Status

The defendants also challenge the procedural circumstances under which their extradition is sought. Usually, a person subject to extradition is a fugitive

and defendants are not fugitives in the ordinary sense, having been allowed to leave Canada following their acquittal. However, the law does not hold to so narrow a definition of the term "fugitive", and this argument also must fail.

Not long after the effective date of the Webster-Ashburton Treaty, the United States Supreme Court, in Roberts v. Reilly, 116 U.S. 80, 97 (1885), held that:

> "To be a fugitive from justice, in the sense of the act of congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another."

See also: Appleyard v. Massachusetts, 203 U.S. 222 (1906).

More recently, the Court for this district applied this looser construction of the term "fugitive" in United States ex rel. Eatessami v. Marasco, 275 F. Supp. 492, 496 (S.D. N.Y. 1967) and held that neither the applicable treaty in that case (between the United States and

Switzerland) nor the law imposes a requirement that an extraditee must be a fugitive from the country seeking extradition. As stated by that Court: "American extradition treaties are usually construed to regard a fugitive as one who is charged with having committed a crime punishable under the laws of the demanding state, but who is not to be found in that territory after allegedly committing the crime."

In Brewer v. Goff, 138 F. 2d 710, 712 (10th Cir. 1943), citing Roberts v. Reilly, supra, the Court held that: "It is plain that the question whether one is a fugitive from justice, within the meaning and intendment of the federal extradition statute, does not depend upon the cause or reason for his absence from the demanding state." See also: In re Chan Kam-Shu, 477 F. 2d 333, 338 (5th Cir. 1973); Application of D'Amico, 177 F. Supp. 648 (S.D.N.Y. 1960); Ex Parte Davis, 54 F. 2d 723 (9th Cir. 1931); Hogan v. O'Neill, 255 U.S. 52 (1921).

In speaking of the Treaty the court in Ex Parte Hammond, 59 F. 2d 683, 686 (9th Cir. 1932) held that:

"This treaty clearly applies to any person within the jurisdiction of either nation who has committed an extraditable offense within the jurisdiction of the other... The treaty applies according to its terms to both those who "shall seek an asylum", and to those who "shall be found" therein. We see no reason for limiting the plain provisions of the statute."

In light of this language, defendants' contention that the applicable treaty provisions do not subject them to extradition because they were allowed to leave Canada, and did not flee, must fail.

Conviction In Absentia As A Denial Of Due Process

Defendants also argue that their conviction in absentia is a denial of their constitutional rights to due process and since extradition is sought, not for trial but for service of sentence following their in absentia conviction, such demand should be denied as not within the intent of the treaty.

Directly on point is the language of Article VII of the Extradition Convention Between the United States and

Great Britain (26 Stat. 1508, 1510 (1889)) amending the Webster-Ashburton Treaty, which states:

> "The provisions of the said Tenth Article and of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefore shall not have been executed."

When the treaty was again supplemented in 1925, to add additional offenses including trafficking in narcotics, it was provided in Article III, that that Convention "shall be considered as an integral part of the said Extradition Convention(s) of the 12th July, 1889..." 44 Stat. 2101. Therefore, the fact that Canada seeks extradition to compel service of sentence and not for trial in no way contradicts the Treaty provisions.

With respect to the due process argument, the Supreme Court has long taken the position, as stated in Neely v. Henkel, 180 U.S. 109, 123 (1901), that:

> "...citizenship does not give him an immunity to commit crimes in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits

> a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulation between that country and the United States.".

More recently, in Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), cert. den., 409 U.S. 869 (1972), the court held (at p. 1219) that:

> "What we learn from Neely is that a surrender of an American citizen required by treaty for purposes of a foreign criminal proceeding is unimpaired by an absence in the foreign judicial system of safeguards in all respects equivalent to those constitutionally enjoined upon American trials."

Certainly, the court was notunmindful of potential prejudice involved. It continued at page 1223:

> "(T)he relevant law enunciated by the Supreme Court...is controlling on this court. We caution, however, that we do not say that appellants' claims of trial unfairness are unworthy of executive scrutiny...To Americans, steeped in a long and unique tradition of criminal-trial fairness, the prospect of a foreign prosecution under less protective standards is disturbing.".

This circuit took a strong position on the issue in Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960) where it held that:

> "The right of international extradition is solely the creature of treaty (Factor v. Laubenheimer, 290 U.S. 276, 287 (1933)). Hence, if the extradition treaty so provides the United States may surrender a fugitive to be prosecuted for acts which are not crimes within the United States...".

The district court had held in Gallina v. Fraser, 177 F.Supp. 856, 866 (D.Conn. 1959), that the extradition of a person convicted in absentia in a foreign nation is not contrary to due process of law:

> "In our view, this is contrary to neither the treaty nor to an accused's rights under the due process clause of the Fifth Amendment, nor any other constitutional protections are given to persons held for trial in the courts of the United States or of the constituent states thereof, those protections cannot be claimed by an accused whose trial and conviction have been held or are to be held under the laws of another nation, acting according to its traditional processes and within the scope of its authority and jurisdiction...[It] is not contrary to due process of law even where it appears that the extradition will not be followed by a new trial, but rather by immediate incarceration for the offense charged upon a

> sentence previously imposed, so long as there is sufficient evidence of criminality to justify extradition in the first place under the statutory and treaty provisions regulating same." (Emphasis added.). See also: Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir. 1973).

As stated earlier, the Government contends that the in absentia conviction and sentencing was not prejudicial because the charge of conspiracy to import carried a minimum sentence of seven years. However, although a minimum sentence of seven years exists for importing, according to the appeals court decision, no minimum exists for conspiracy to traffic, one of the three conspiracies charged. Therefore, had the appellate court chosen to convict on the lesser of the three charges, no mandatory minimum sentence would, of necessity, be imposed.

In light of this, perhaps the Canadian courts should give some consideration to resentencing these defendants following extradition. If such a procedure were followed, they could consider sentencing under the conspiracy to traffic in narcotics charge, to which no mandatory minimum sentence is assigned.

We wish to emphasize that the granting of Canada's extradition request is not contingent on such review and resentencing. Indeed, no such authority exists in our courts. As stated in Gallina v. Fraser, supra, at 78-79:

> "We have discovered no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition... The authority that does exist points clearly to the proposition that the conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the Government.".

Consequently, if any such action is to be taken, it would be at the discretion of the State Department.

Double Jeopardy Argument

Finally, regarding the double jeopardy argument presented by the defendants, it does not appear that they are truly facing a double jeopardy situation. Rather, the right to appeal dismissals of charges, by the prosecution, granted under Canadian law, has resulted in a delayed conviction. Even if this was a classic instance of double

jeopardy, it would be of no avail to defendants. A case most clearly in point is In re Ryan, 360 F.Supp. 270, 274 275 (E.D.N.Y. 1973), aff'd., 478 F.2d 1397 (2d Cir. 1973), in which the Court held:

> "The double jeopardy claim must also fail. There is no constitutional right to be free from double jeopardy resulting from extradition to the demanding country. The fact that the full range of our constitutional protections will not be available to the detainee at her trial will not bar extradition. Those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.
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> * * *
>
> "The Fifth Amendment right not 'to be twice put in jeopardy of life or limb' is available only to prosecutions in this country." See also: Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); United States v. Feinberg, 383 F.2d 60 (2d Cir. 1967); United States v. Smith, 446 F.2d 200, 202 (4th Cir. 1971).

Conclusion

It should be noted that a committing magistrate in international extradition proceedings is required merely to determine whether there was competent legal evidence which, under United States or state law, could justify commitment

to stand trial, if the crime had been committed in the United States. 18 U.S.C. §3184; Collins v. Loisel, supra, at 314. It is unnecessary to consider matters within the realm of international comity or argument that might be made to the Canadian courts for post-conviction relief.

Therefore, it is clear from the above cited authorities that the defendants' arguments, although persuasively urged by their counsel, offer no valid grounds for refusing the petition for extradition.

The defendants will be ordered committed to the custody of the Attorney General, and these findings, including the evidence and exhibits taken herein, will be certified to the Secretary of State for appropriate action.

SO ORDERED:

Gerard L. Goettel

Gerard L. Goettel
United States Magistrate

DATED: New York, N.Y.
August 21, 1974

NOTICE OF ENTRY

Please take notice that the within is a
(ied) true copy of a
ntered in the office of the clerk of the with-
ied court on 19

Yours, etc.

SIEGEL & GRABER

ey(s) for

Office and Post Office Address
401 BROADWAY
NEW YORK, N. Y. 10013

ey(s) for

NOTICE OF SETTLEMENT

Please take notice that an order

of which the within is a
opy will be presented for settlement to the
f the judges of the within named Court, at
day of 19
M.

Yours, etc.

SIEGEL & GRABER

ey(s) for

Office and Post Office Address
401 BROADWAY
NEW YORK, N. Y. 10013

74 Civ. 3252

Index No. Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES ex rel. DAVID BLOOMFIELD,

Petitioner,

-against-

LOUIS GENGLER, WARDEN, Federal House of Detention, New York, New York, and THOMAS E. FERRANDINA, United States Marshal for the Southern District of New York,

Respondent.

MICROFILM

SEP 25 1974

PETITION FOR WRIT
OF HABEAS CORPUS

SIEGEL & GRABER

Attorney(s) for Petitioner

Office and Post Office Address
401 BROADWAY
NEW YORK, N. Y. 10013
WORTH 2-1295

To

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated, 19

Motion denied for the reasons stated in the Opinion of Magistrate Goettel dated August 21, 1974, which is adopted by the Court.

So ORDERED

Sept. 24, 1974

William C. Conner
U.S.D.J.

U.S. DISTRICT COURT
FILED
SEP 25 1974
S.D. OF N.Y.

ATTORNEY'S AFFIRMATION

STATE OF NEW YORK
COUNTY OF

The undersigned, being an attorney duly admitted to practice in the courts of the State of New York shows: that he is the attorney(s) of record or an attorney acting as of counsel with the attorney of record for the in the within action; that he has read the foregoing

and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true. He further states that the reason this affirmation is made by him and not by the

The grounds of his belief as to all matters not stated upon his knowledge are as follows:

That undersigned affirms that the foregoing statements are true, under the penalties of perjury, pursuant to Rule 2106 CPLR.

Dated:

Signature

Typed

ATTORNEY'S CERTIFICATION

STATE OF NEW YORK
COUNTY OF

The undersigned attorney certifies pursuant to Section 2105 CPLR that the within has been compared by the undersigned with the original on file in the office of and found to be a true and complete copy.

Dated:

Signature

Typed

ROBBINS STATIONERY CO.

ORDER

MEMO ENDORSED JUDGE CONNER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 CIV. 3752

UNITED STATES ex rel
DAVID BLOOMFIELD,

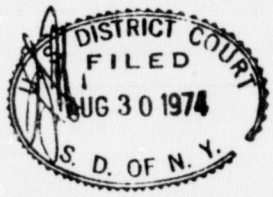
Petitioner,

-against-

LOUIS GENGLER, Warden, Federal House of Detention, New York, New York, and THOMAS E. FERRANDINA, United States Marshal for the Southern District of New York,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS



To the United States District Court for the Southern District of New York

HERMAN I. GRABER, duly sworn, deposes and says:

I am the attorney for David Bloomfield and am familiar with the facts and circumstances in this case.

1. The petitioner, David Bloomfield is now on bail subject to the custody of United States Marshal Thomas E. Ferrandina and Warden Louis Gengler of the Federal House of Detention, New York, New York following an adverse ruling in the matter of his extradition (See Exhibit 1) by Magistrate Gerard L. Goettel.

This decision, pursuant to which petitioner is being detained, is illegal under the Treaty controlling such extradition, the Constitution of the United States and the laws of the State of New York. The facts, showing this violation are as follows:

1. Three American citizens were co-defendants in a Canadian trial for conspiracy to violate her laws. At the close of the prosecutor's case, the trial judge dismissed the charges because of a faulty indictment. Under Canadian law, and after the open departure to the United States of the petitioner herein, the Crown took an appeal and won on one count of the indictment. The Appeal Division then sentenced the petitioner, in absentia, to seven years imprisonment on the basis of the evidence adduced at the trial level. Canada then moved to extradite the petitioner to serve this sentence.

2. Although treaties are to be liberally construed, a fundamental principal governing extradition under the Webster-Ashburton Treaty is that if there is no right to try a person in an asylum country, there is no right to extradite him.

3. Under the United States Constitution, and the laws of the State of New York (which govern here), the right not to be placed in double jeopardy for the same crime would preclude such extradition at the time of petitioner's return to this country following his acquittal.

4. Further, the Webster Ashburton Treaty and its additions and amendments are clearly directed at "fugitives". Petitioner left Canada as a free man and has never fled any jurisdiction to avoid answering for crimes he may or may have not committed.

5. The Webster-Ashburton Treaty has no provision for the extradition of persons convicted of the crime of Conspiracy. Since petitioner's conviction was for that crime and there is disparity between the Canadian and American views of conspiracy as a crime, the fact that he was never convicted of a substantive offense, would make him not subject to Canadian extradition.

6. The conspiracy, petitioner Bloomfield now stands convicted of, is one to import hashish. Hashish, a form of cannibis, is not a "narcotic" drug either definitionally or legally and extradition cannot be based upon implied mutuality under the Treaty for the "Suppression of the Traffic in Narcotics" made between the United States and Canada in 1925.

Because of the foregoing facts, petitioner is being restrained of his liberty by the respondents in violation of the Constitution of the United States and Treaties pursuant thereto and he therefore prays that the writ be granted and an order be entered discharging him from custody.

HERMAN I. GRABER

Sworn to before me this
29th day of August, 1974.

NOTARY PUBLIC

SEYMOUR BIEDER
Notary Public, State of New York
No. 24-5318360
Qualified in Kings County
Commission Expires March 30, 1975

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DAVID BLOOMFIELD, being duly sworn, deposes and says, that deponent is the petitioner in the within action; that deponent has read the foregoing petition for habeas corpus and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

David Bloomfield
DAVID BLOOMFIELD

Sworn to before me this
30th day of August, 1974

Seymour Bilder
NOTARY PUBLIC

SEYMOUR BILDER
Notary Public, State of New York
No. 34-5318350
Qualified in ~~Kings County~~ New York County
Commission Expires March 30, 1976

A-36

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT FILED AUG 30 1974 S. D. OF N.Y.

UNITED STATES ex rel
DAVID BLOOMFIELD,

Petitioner,

-against-

LOUIS GENGLER, Warden, Federal House of Detention, New York, New York, and THOMAS E. FERRANDINA, United States Marshal for the Southern District of New York,

Respondent.

DOCKET NO.

74 CIV. 3752

Judge Conner

Upon the annexed copy of a verified petition for a writ of habeas corpus, the original of which has been filed with this Court, it is hereb

ORDERED, that the respondent or his attorney show cause before a judge of this Court at the United States Courthouse, Foley Square, New York, New York, in room 506 at 10:00 A. M. on September 6, 1974, or as soon thereafter as counsel may be heard, why an order should not be entered directing that a writ of habeas corpus issue against the respondent and for such further relief as this Court may deem proper, and is further

ORDERED that a copy of this order, together with the papers upon which it is granted be personally served upon respondent or his attorney on or before August 30, 1974 at 5:00 p. M., and that such service shall be deemed good and sufficient.

DATED: New York, New York
AUGUST 30, 1974

William C. Conner
U.S.D.J.

A-37

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[redacted],

Petitioner,

-against-

THOMAS E. FERRANDINA, UNITED STATES MARSHAL,

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

WILLIAM ESBITT

Attorney for Petitioner

122 East 42nd Street

NEW YORK, N.Y. 10017

OXford 7-0133

Opinion of Magistrate Goettel dated August 21, 1974, as supplemented at the oral hearing before the Court on September 20, 1974.

So Ordered

Sept. 23, 1974

William E. Conner

U. S. D. J.

A-38

MEMO ENDORSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JOHN BENNETT ETTINGER,

Petitioner,

-against-

THOMAS E. FERRANDINA, UNITED STATES MARSHAL,

Respondent.

----------x

NO.:_____

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

The petition of JOHN BENNETT ETTINGER, respectfully shows:

1. Petitioner makes application herein for a Writ of Habeas Corpus in that he is unlawfully detained and restrained of his liberty by the United States Marshal for the Southern District of New York.

2. The cause or pretext of such retention and restraint is an order of the United States Magistrate Gerard L. Goettel on the petition of Assistant United States Attorney Thomas E. Engel which order certifies that the evidence presented before him was sufficient to sustain the charge on behalf of the Dominion of Canada under the provisions of the Extradition Treaty between the United States of America and the Dominion of Canada.

3. Your petitioner, an American citizen, was arrested together with David Allan Bloomfield and Wilfred Julien Cormier, in Canada in 1972 and charged in a three count indictment with conspiracy to export hashish, conspiracy to import hashish and conspiracy to traffic in hashish.

4. All three were tried before Judge Reginald D. Keirstead in the County Court Judges Criminal Court for the County of St. John, Dominion of Canada and after trial, on July 25, 1972, Judge Keirstead dismissed all of the charges against all defendants, including your petitioner.

5. On July 31, 1972 your petitioner was released from incarceration and returned to the United States. At the Canadian airport your petitioner was served with a notice that the Attorney General of Canada would appeal from the dismissal of the criminal charges.

6. On January 30, 1973 the Canadian Appellate Court reversed the trial Judge's dismissal of the charges, found the three defendants guilty of conspiracy to import hashish into Canada but entered a verdict of not guilty to the other two counts including the charge of conspiracy to traffic in narcotics. The Appellate Court imposed a seven year prison term on your petitioner in absentia.

7. Apparently the Canadian government took no action in this matter for more than a year after the decision of the Appellate Court. On March 27, 1974 Assistant United States Attorney Thomas E. Engel, acting on behalf of the Dominion of Canada filed a complaint with the Magistrate's Office for the

Southern District of New York seeking the arrest and extradition of your petitioner and David Allan Bloomfield. Your petitioner was released on $25,000 bail set by Magistrate Gerard L. Goettel Your petitioner's father, Charles Ettinger, posted cash bail of $10,000 and together with petitioner's mother signed an additional bail guarantee of $15,000.

8. Hearings were held before Magistrate Goettel, briefs were submitted by my attorney, William Esbitt, and Assistant United States Attorney Thomas E. Engel and on August 21, 1974 Judge Goettel in an opinion which is annexed hereto sustained the government's application for extradition. However, Judge Goettel agreed to withhold certifying the matter to the Secretary of State for appropriate action until September 4,197 to permit my attorney to apply for a Writ of Habeas Corpus and for a continuation of bail.

9. Your petitioner is informed by his attorney and believes that the arrest, detention and restraint is unlawful and that the complaint for extradition should be denied for th legal reasons set forth in my attorney's affidavit annexed hereto.

10. No other application for a writ has heretofore been made to any other Court or Judge.

John Bennett Ettinger

JOHN BENNETT ETTINGER

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOHN BENNETT ETTINGER, being duly sworn, deposes and says:

That he is the petitioner in the within action; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that to those matters he believes them to be true.

John Bennett Ettinger
JOHN BENNETT ETTINGER

Sworn to before me this
3rd day of September 1974.

ELIHU S. MASSEL
NOTARY PUBLIC, State of New York
No. 31-7754800
Qualified in New York County
Commission Expires March 30, 1976

A42

Charles Ettinger, is a practicing attorney in New York City and petitioner resides with his parents in New York City and has been present at every Court proceeding. In the opinion of your deponent, there is no doubt that petitioner will respond to every request by the Court.

William Ettinger

Sworn to before me this
30th day of August 1974.

Rose Rosati

ROSE ROSATI
NOTARY PUBLIC, State of New York
No. 31 8547250
Qualified in New York County
Commission Expires March 30, 1976

A 453

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JOHN BENNETT ETTINGER,

Petitioner,

-against-

THOMAS E. FERRANDINA, UNITED STATES MARSHAL,

Respondent.

----------x

No.:_____

AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

WILLIAM ESBITT, being duly sworn, deposes and says:

1. I am the attorney for the petitioner, JOHN BENNETT ETTINGER, and I submit this affidavit in support of his application for a Writ of Habeas Corpus and for a continuation of bail pending this Court's determination of the habeas corpus proceedings.

2. I believe that the arrest, detention and restraint of the petitioner is unlawful and that the complaint for extradition should be dismissed for the following reasons:

A. Extradition can only be granted if the complaint charges an extraditable offense. The Extradition Treaty between Canada and the United States is limited by its terms to "trafficking in narcotics". The Appellate Court in Canada, reversing the trial Judge who dismissed the charges, found the petitioner guilty of conspiring to import hashish but specifically found the petitioner

B. Under the United States Law (21 USCA Sec.802(15)(16)), hashish is specifically not a narcotic and, therefore the conspiracy to import hashish does not come under the application of the Extradition Treaty.

C. Although all the charges against the petitioner were dismissed by the trial Judge, the Appellate Court reversed and convicted the petitioner in absentia and sentenced him to seven years imprisonment. His absence from the jurisdiction of Canada and return to the United States, his home, was on advice of his Canadian attorney and with the knowledge of the Canadian authorities. Annexed hereto and made a part hereof is a stipulation entered into with the United States Attorney and made a part of the record before Magistrate Goettel. Having once been acquitted by a trial Judge, it would be contrary to the basic and fundamental principle of American Constitutional Law to permit the petitioner to be twice placed in jeapardy.

3. Your deponent will submit on the argument of the Orde to Show Cause a memorandum of law citing substantial authority to support petitioner's position for a dismissal of the extradition complaint.

4. With respect to bail, Judge Goettel set bail for the petitioner at $25,000 of which petitioner's father posted cash bail of $10,000 and his father and mother have executed an additional $15,000 bail guarantee. Petitioner's father,

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DAVID BLOOMFIELD, Petitioner, - v s - LOUIS GENGLER, WARDEN OF FEDERAL HOUSE OF DETENTION, Respondent.	74 Civ. 3752
JOHN BENNETT ETTINGER, Petitioner, - v s - THOMAS E. FERRANDINA, U. S. MARSHAL, Respondent.	74 Civ. 3803

B e f o r e :

HON. WILLIAM C. CONNER,

District Judge.

September 20, 1974
3:00 p. m.

A p p e a r a n c e s :

PAUL J. CURRAN, ESQ.,
United States Attorney for the
Southern District of New York,
By: THOMAS E. ENGEL, ESQ.,
Assistant United States Attorney.

Rec'd 9/23

Appearances: [continued]

HERMAN GRABER, ESQ.,
Attorney for Petitioner Bloomfield.

WILLIAM ESBITT, ESQ.,
Attorney for Petitioner Ettinger.

[Case called.]

MR. ESBITT: Petitioner Ettinger ready, your Honor.

MR. GRABER: Petitioner Bloomfield is ready.

MR. ENGEL: The Government is ready, your Honor.

THE COURT: First I want to apologize for being a little late. I had a pre-trial conference in chambers that went on a little longer than I anticipated. Please accept my apologies.

MR. ESBITT: I have an apology to offer your Honor. Your Honor directed me last Friday to submit a brief by Thursday afternoon at five o'clock. I regret, your Honor, that I was unable to do so, but I did serve it this morning at about eleven oclock and a copy was furnished immediately thereafter to Mr. Engel. I apologize to the Court.

THE COURT: I did take the time to read it and I have read all of the memoranda that have been filed both here and before Magistrate Goettel. I have carefully considered all of the arguments that have been made both by the petitioners and by the Government and find that they are with one possible exception the same arguments that were made before Magistrate Goettel and which with respect to the arguments of the petitioners he rejected in his unusually thorough and well written opinion.

I mentioned one possible exception, and that is that in a slight twist on an argument that has been made before Magistrate Goettel the reply memornadum for Mr. Ettinger argues that Ettinger cannot be extradited under a treaty providing for extradition for "trafficking in narcotics", since he was acquitted in Canada on a charge of conspiracy to trafficking in narcotics.

More accurately, the trial judge in Canada partially found that Ettinger was a member of a conspiracy to traffic in, import and export narcotics, but dismissed the indictment since it charged three separate conspiracies instead of a single conspiracy to import, export and traffic in narcotics.

On appeal the Appellate Court stated that the trial judge should have selected one of the three counts and found the defendants guilty on that count and rather than remanding the case to the trial judge to select the count, they selected the count of conspiracy to import narcotics which carried a minimum seven-year sentence.

So we have a situation where the defendants stand convicted in Canada of a conspiracy to import narcotics and the Webster Ashburton Treaty as amended provides for extradition for high crimes and offenses against the laws for the Suppression of trafficking in narcotics.

In the Valentine vs. Neidecker case, which is cited in a number of the memoranda, the U. S. Supreme Court ruled that extradition treaties are to be liberally construed. And without a liberal interpretation it seems clear to me that conspiracy to import narcotics is an offense against the laws for the suppression of trafficking in narcotics and it was so ruled in the Edmonson case, which is cited in a number of the memoranda. The Court in that case also ruled that marijuana is a narcotic within the meaning of that treaty as amended.

We concluded for the reasons stated by Magistrate Goettel that hashish, a derivative of marijuana, is also a narcotic within the intent of the treaty and indeed it was so classified by both the United States and Canada at the time of the original treaty and at the time of the amendments. Although it is not now classified as a narcotic by the United States, it is a Schedule 1 controlled substance which Congress has found to require the most stringent control.

I am accordingly going to deny the petition for a writ of habeas corpus and I will adopt the opinion of Magistrate Goettel as I have presently supplemented it.

Now, I had continued the bail originally set by the magistrate over the objection of the United States

Attorney's Office, but in view of the fact that the situation is now changed and I have ruled against the petitioners for a writ of habeus corpus I am going to revoke bail and remand the petitioners to the custody of the U. S. Marshal for extradition.

I don't know whether you want to make an appeal on this to the Court of Appeals.

MR. ESBITT: Yes, I do, and may I ask your Honor -- and I am sure Mr. Graber will join with me in this request -- that your Honor suspend or continue bail for such reasonable time as will be necessary for us to make an application in the Court of Appeals as has happened in the Shapiro case and in the Gerard case and in every case that I have been able to research on similar circumstances.

THE COURT: This situation is a little different in that we have two persons here who have already been convicted and the impetus is always greater in a situation like this than it is in a situation where we would have fugitives who have not yet been tried.

MR. ESBITT: Your Honor, they have been convicted for a long time now and they have had an opportunity to flee for more than a year and certainly for months since this proceeding in this court was initiated by the client of

Mr. Engel and they have not fled, and yet they were convicted at that time.

THE COURT: Obviously they didn't know that they were going to be extradited at that time.

MR. GRABER: Your Honor, may I just say something?

THE COURT: If Mr. Engel will tell me that it is satisfactory to the United States Attorney's Office to have the bail continued, then I will take the responsibility for continuing it.

MR. ENGEL: No, your Honor, I am afraid I cannot do that.

MR. GRABER: Your Honor, may I just be heard on this matter?

THE COURT: Yes.

MR. GRABER: Judge Goettel ruled against the defendants, or the petitioners. There was again a question as to whether or not the Court would continue them on bail. As your Honor realizes, your Honor originally denied bail in this matter but you continued them for one week pending our ability to convince your Honor contrary to your Honor's ruling. The defendants did not flee. The defendants were ordered extradited by Judge Goettel, they did not flee. There is no question about the fact that the bail here is more than sufficient to insure their return.

They have been in court on each and every occasion required, and when your Honor had indicated that last Friday they were going to be remanded, they were ready to go; they had brought their belongings with them; they brought reading matter with them; they were ready and willing to proceed to jail. They did not flee, although they had a week in which to do it, and they did not. They are not going to flee. What you are talking about is $25,000 bail and that's a large amount of money and I would request that your Honor permit us to take our appeal; to give the ten days required on that to get our papers before the Circuit and ask the Circuit at this time to continue them on bail or not, but certainly, your Honor, in every matter -- we are talking about in re Shapiro. Shapiro was a man who was arrested in Israel; bail was set in Israel; he fled the jurisdiction; he forfeited bail in Israel; he came to this country and he is presently on bail. He has been on bail in this matter for two years. Now, these two young men have never once fled the jurisdiction of Canada. They have never once fled any jurisdiction that I am aware of. This is not a case of where they were in Canada and decided to be contemptuous of their system and leave. They left. They had a right to leave. The Canadian Government acknowledged that right at the airport,

your Honor, when two Mounties presented them with a notice of appeal, saluted them and informed them that they could not stop them from going, but they were taking an appeal and they allowed them on the plane. These are not people who flee. This is a totally different situation. The argument for bail in this case is far stronger than in Shapiro because Shapiro showed nothing but contempt for a Court -- not in this country, but certainly in Israel -- and he forfeited his bail in Israel. I think that this case is a far stronger one for bail than Shapiro and Shapiro is out.

MR. ESBITT: May I supplement that, your Honor, please.

In the Ryan case, which was decided by Judge Jacob Mishler, Hermeine Ryan was charged with murder, murder, and they filed extradition proceedings in the Eastern District of New York. There were hearings before Judge Mishler. The murder that she was accused of was murder in concentration camps during World War II, and yet Judge Mishler, who ruled against extradition and ordered her to be deported, permitted her to be released on bail and permitted the release of -- the continuation of Mrs. Ryan on bail pending an application to the higher court, the Federal Court of Appeals.

I think the appropriate question, if I may be so bold as to suggest to your Honor, is the same question that your Honor asked of Mr. Engel last week: Not whether or not the U. S. Attorney consents to bail, but whether or not the U. S. Attorney has any evidence to indicate that bail would not be a satisfactory protection for the Court, and when your Honor asked that question last week the response from Mr. Engel was he had nothing to suggest to your Honor and I am sure he has nothing today. On the contrary, the fact that these young men are here today and have been in court each time when we have had a court proceeding is --

THE COURT: Let's let Mr. Engel speak for himself. Is there any reason why you believe that Mr. Ettinger and Mr. Bloomfield will not appear when directed?

MR. ENGEL: No, your Honor, there is no reason. I say that frankly because I really believe that. However, I would like to bring two or three matters to your Honor's attention. In the Ryan case, for example, and in the Shapiro case, your Honor has noted the defendants therein have not been convicted in the country which sought their extradition from the United States. In the Shapiro case the number of grounds on which Mr. Shapiro objected to his extradition I believe in the West Reporter numbered

something like 25 keynotes.

With respect to the Ryan extradition, she was being -- extradition was sought under a West German authority for war crimes and Mrs. Ryan again had substantial reasons to believe that on appeal these matters might be changed.

Here, as your Honor has shown today that you have adopted Magistrate Goettel's opinion. The petitioners in this case have added in my opinion, and I think in the Court's opinion, nothing new. There is no reason to believe that the matter will stand on any different footing when it goes to the Court of Appeals and in my judgment, your Honor, the matter stands rather pat. Furthermore, I draw your Honor's attention to Section 3188 at the time of commitment pending extradition in which the Government has two months in which to bring the surrender of these defendants to the Canadians. Now your Honor has ruled that the petitions for habeus corpus is denied. In my judgment, therefore, any toll of that two-month period would be suspended even though your Honor grants bail from the time that the habeus corpus petitions have been denied until such time as it is reopened in the Court of Appeals. I think that as I have stated before last week --

THE COURT: Let me see if I understand you. Are you saying that the sixty-day period only runs during detention?

MR. ENGEL: I am concerned, your Honor, that while the petitions for writ of habeus corpus -- that the time has told. You now denied the writ and I believe now that that time is running against the Government and that's my concern here. I think the Canadian Government, as I have stated before, has expressed grave interest in this thing. I think it is a matter of statute and stands on a wholly different footing than what are commonly made to your Honor as bail applications in criminal proceedings in this court.

MR. GRABER: Your Honor, first of all I must take exception. I don't believe that the time is tolling pending court proceedings. The time begins to toll after your Honor makes its ruling and they are remanded. If the Government then, or the Government of Canada and the United States Government do not take action within sixty days after that remand, then I think we would have application under this particular statute, but the mere fact that your Honor has ruled, and we are requesting a delay, how can you say that that tolls, and if it does begin to toll, that the mere request on our part for it stops the

tolling of the statute immediately. We are waiving it.

THE COURT: You don't understand what the word toll means. Toll means to stop.

MR. GRABER: I am sorry, you are right. The time is not running is really what I meant to say, your Honor.

THE COURT: What you are saying, then, as I understand it, is that as long as these gentlemen are out on bail the time is not running; the sixty-day period is not running.

MR. GRABER: Absolutely not.

THE COURT: So that as long as you can stall in the Court of Appeals, these men will be free. There is an incentive for you not to attempt to get a prompt ruling from the Court of Appeals.

MR. ESBITT: You can overcome that, your Honor. All you have to do is specify one week to make our application to the Court of Appeals. If the Court of Appeals denies our application, then they will be remanded.

MR. GRABER: Plus the fact our record in this case on both our parts, both Mr. Esbitt and myself, indicates that we have done nothing to delay the proceedings in this matter. We have appeared on time. We have submitted

our papers on time. We have not asked for any adjournments beyond that which was reasonable. We don't intend to proceed in any other fashion. I feel, quite frankly, that we do have adequate grounds to contest this. Obviously your Honor has disagreed with us and has ruled against us. But I certainly am not taking what I feel is a frivolous appeal.

MR. ESBITT: Your Honor, Judge Goettel was in the exact same position that your Honor is in now several weeks ago when he came down with this opinion in this case and yet you will note that in his opinion he stayed sending the papers to Washington in order to give us an opportunity to file our writ of habeus corpus. All we ask your Honor to do is to extend the same privilege to us as Judge Goettel extended to us and -- I don't know of a case where a District Court Judge has remanded them and has not granted the petitioners a short, reasonable opportunity to appeal to the Court of Appeals.

THE COURT: All right. I will extend the bail for one week from today. That's through next Friday, the 27th.

MR. GRABER: Your Honor, may I just --

THE COURT: That will give you time to either file a notice of appeal or to apply to the Court of Appeals to

extend the bail pending appeal. I am sticking my neck way out for you young men.

MR. ESBITT: I don't think you are.

THE COURT: Quite frankly, I am disturbed a little by the fact that this reversal and extensions came on appeal, but I believe I am powerless to do anything about it. I believe that the Court of Appeals will affirm what I have done. I am giving you an additional week in reliance on your appearing when you are told to, and I am going to repeat what I told you last week when you were here, and that is not only will a non-appearance forfeit the $25,000 bail that's posted, but it will render you a violator of a statute which provides a penalty of five years' imprisonment and a $5,000 fine for jumping bail.

As I said at that time, the arguments you have against extradition will be meaningless in connection with that offense because that will be an offense against the Canadian Government for which you would have to be extradited.

So, for your own sake don't make me look bad by not showing up when you are supposed to show up.

MR. ENGEL: Your Honor, am I to understand, then, that the petitioners Ettinger and Bloomfield, will be calendared for surrender on Friday next and that any

application to stay their surrender must be taken to the Court of Appeals prior to that time; is that correct?

THE COURT: That's correct.

MR. ENGEL: Thank you.

THE COURT: And they need not surrender before me, they can surrender before the Part One Judge in the event I am not available at that time.

MR. ENGEL: That will be calendared at 10:30.

MR. GRABER: Your Honor, I would ask for an afternoon calendar.

MR. ESBITT: I join in that.

THE COURT: I told them that they could have a week. Let's calendar it for two o'clock Friday afternoon.

MR. ENGEL: Your Honor, I will do that unless the judge cannot take it at two o'clock and frequently the Part One Judge insists on surrenders at 10:30 and I think we ought to calendar it for 10:30 unless Mr. Graber --

THE COURT: In view of the fact that next Thursday is a religious holiday, that maybe we ought to make it for next Monday, which is the criminal day --

MR. ENGEL: Surrenders are taken every day and the Government would object to anything in excess of one

week.

MR. GRABER: Your Honor, I was going to ask for Monday because of Yom Kippur because Wednesday is a half day for me and then Thursday is out, so actually I in terms of my work would only have three and a half days next week.

MR. ENGEL: A surrender doesn't require any legal research, Mr. Graber.

MR. GRABER: It is not a matter of that. You know what I am talking about, Mr. Engel.

THE COURT: Yes, they are going to petition the Court of Appeals in the meantime to extend the bail.

All right, then it will be at 10:30 on Monday, the 30th of September.

MR. GRABERG: Thank you very much, your Honor.

[Adjourned to Monday, September 30th at 10:30 a.m.]

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

DAVID ALLAN BLOOMFIELD and
JOHN BENNETT ETTINGER,

Defendants.

----------x

IT IS HEREBY STIPULATED AND AGREED by and between the United States Attorney and the attorneys for the defendants herein that if the defendants were called to testify at a hearing before Magistrate Gerald L. Goettel they would testify as follows:

1. That on or about July 31, 1972 they were released from incarceration in the New Brunswick Dominion of Canada as the result of the dismissal of all criminal charges against them by Judge Reginald D. Keirstead in the County Court Judges Criminal Court for the County of St. John, Dominion of Canada.

2. That upon release from said incarceration they were advised by their Canadian counsel, John Barry, that all criminal charges against them had been dismissed and that they were free to leave the Dominion of Canada and return to their homes in the United States.

3. That pursuant to said advice they proceeded to the airport for the purpose of returning to the United States.

A-64

[illegible] they were about to enter the airplane to return to the United States they were each served by a Canadian Officer with a notice of appeal, a copy of which is annexed hereto and made a part hereof.

5. That upon service of said notice of appeal the said Canadian Officer advised each of the defendants that they were free to return to the United States, saluted each of them and left the airport.

6. That immediately thereafter the said defendants entered said airplane and returned to the UnitedStates.

DATED: New York, New York
June 1974.

Thomas E. Engel
UNITED STATES ATTORNEY

Attorney for Defendant
David Allan Bloomfield

Attorney for Defendant
John Bennett Ettinger

A-65

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 3 day of Oct, 1974 deponent served the within Appendix upon N.Y.S. Attorney

attorney(s) for Appellee

in this action, at N.Y.S. Attorney, Foley Sq NYC

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
3 day of Oct. 1974

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976